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20994—37——1

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT K. WURTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, entered in the above cause on July 13, 1937.

OPINIONS BELOW

The opinion of the District Court (R. 22–25) is not reported. The opinion of the Circuit Court of Appeals (R. 35–36) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1937 (R. 37). The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under a statutory provision requiring the United States to bring suit for the recovery of an erroneous refund within "two years after the making of such refund", the limitation period commences to run from the date on which the Commissioner of Internal Revenue approves the schedule of refunds and credits, or from the date of the delivery of the refund check.

STATUTES AND COMMITTEE REPORTS INVOLVED

The statutes and committee reports involved will be found in the Appendix, *infra,* pp. 11–14.

STATEMENT

The facts, as alleged in petitioner's statement of claim (R. 12–14), and admitted by respondent (R. 15–16), are as follows:

On or about March 15, 1930, the taxpayer filed an income tax return for the year 1929 reporting a net income of $94,065.14, and a tax of $17,195.14, which was duly paid (R. 13).

As the result of an audit of the taxpayer's return, the Commissioner of Internal Revenue erroneously determined that the taxpayer's reported net income was overstated in the amount of $21,835.87, representing the amount received by

him as beneficiary of a trust created under the will of his wife (R. 13).

Thereafter an overassessment certificate, dated March 15, 1932, issued; and as a result of said overassessment, a certificate check dated April 30, 1932, in the amount of $4,513.37, was mailed to taxpayer (R. 13, 14).

After demand, the taxpayer refused to repay the amount, and on April 26, 1934, this action was commenced (R. 1, 14).

On November 23, 1934, the taxpayer filed an affidavit of defense (R. 15–16), raising the question of law that the amended statement of claim showed on its face that suit was not brought before the expiration of two years after the making of the refund.

The District Court first ruled in favor of the Government (R. 17–19), but on reconsideration held for the taxpayer (R. 22–25). Final judgment accordingly was entered for the taxpayer (R. 26–27). The Circuit Court of Appeals affirmed the judgment of the District Court (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Government's action was not commenced within the time allowed by law.

2. In holding that in an action brought under Section 610 of the Revenue Act of 1928 for the recovery of moneys erroneously refunded to the

taxpayer the limitation period commenced upon the signing of the certificate of overassessment.

3. In affirming the District Court's judgment sustaining the taxpayer's demurrer to the petition and in dismissing the case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that the "making" of a refund, which starts the two-year limitation period governing recovery of erroneous refund, Section 610 (b) of the Revenue Act of 1928, *infra*, p. 11, occurs when the Commissioner first signs the schedule of overassessment, in view of Section 1104 of the Revenue Act of 1932, *infra*, p. 12, which provides that the date on which the Commissioner first signed a schedule of overassessment, if after May 28, 1928, "shall be considered as the date of allowance of refund or credit."

1. The decision is based upon a misconstruction of Section 610 of the Revenue Act of 1928, and upon a misapplication of Section 1104 of the Revenue Act of 1932. The Government contends that the limitation period prescribed by Section 610 started running only upon the delivery of the refund check, and that Section 1104 deals with an intra-departmental process fundamentally different from the making of a refund, was enacted for a different purpose, is not in *pari materia* with Section 610, and in no way modifies that section.

It is clear that in the Revenue Act of 1928, Congress appreciated the fundamental distinction be-

tween the allowance of a claim for refund and the making of a refund. Substantially the same definition of "date of allowance of refund" as that stated in Section 1104, was contained in Section 1116 (b) (2) of the Revenue Act of 1926, *infra*, pp. 11–12, which used it to fix the date terminating interest to the taxpayer on a refund. In Section 614 of the Revenue Act of 1928, *infra*, p. 12, in close sequence with Section 610, Congress changed Section 1116 of the 1926 Act by providing that interest should run to a date preceding the date of the refund check by not more than thirty days. The Report of the House Committee on Ways and Means explained the change as follows (H. Rep. No. 2, 70th Cong., 1st Sess., p. 35):[1]

> The principal change made in existing law is that in the case of a refund the interest period now terminates with *the allowance of the refund, a date which often precedes the actual making of the refund by a considerable period of time* and thus deprives the taxpayer of interest during that period. Under the above provision of this bill, interest runs to a date not more than 30 days preceding the date of the refund check, such date to be determined by the Commissioner. This provision is administratively practicable and it will result in giving the taxpayer interest to within approximately 30

[1] The Senate Finance Committee made the same Report (S. Rep. No. 960, 70th Cong., 1st Sess., p. 43).

> days of the *date of the refund.* [Italics supplied.]

This report clearly evinces the understanding of Congress that the "making" of the refund takes place when payment is actually made, subsequent to the signing of the schedule.

Section 1104 of the 1932 Act is not in *pari materia* with Section 610. Congress defined the date of allowance of a refund or credit, and made the definition retroactive to the date of the passage of the 1928 Act which contained no similar definition,[2] primarily for the purpose of determining whether a credit or refund was timely or not. *Cf. United States* v. *Swift & Co.*, 282 U. S. 468. The Committee Reports, *infra*, pp. 12–14, reveal that Congress set the date of allowance at the date on which the Commissioner first signed the schedule in order to permit small taxpayers, unaware of their right to a refund, to take advantage of the fact that before the expiration of the statutory period governing claims for refund, the Commissioner had signed a schedule. The considerations which prompted Congress to save the rights of a taxpayer, entitled to a refund, from prejudice because of the complicated intra-departmental process by which a schedule is transmuted into the correct bookkeeping entry—statement, credit, or refund—do not sug-

[2] Section 614 of the 1928 Act modified Section 1116 of the 1926 Act, and failed to reenact any definition of date of allowance.

gest that while this process is going on, and while the Commissioner might still "scratch out his signature, and declare it [the schedule] inadvertent", *Daube* v. *United States*, 289 U. S. 367, 372, the statute of limitations was intended to run against the United States on a suit which the Government cannot yet institute against a taxpayer not rightfully entitled to the refund.

2. The decision is in substantial conflict with *Paulson* v. *United States*, 78 F. (2d) 97 (C. C. A. 10th). Two suits were there involved. Both were filed more than two years after the schedule of overassessments was approved; one was filed within two years of the issuance of the refund check; the other was filed more than two years after the mailing of the refund check but less than two years after the delivery thereof. The Circuit Court of Appeals held both suits timely (p. 99).

> * * * the refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered. Communication with the taxpayer absent, the preceding actions are exclusively intradepartmental or interdepartmental, and may

> be changed, corrected, revised, or rescinded, as circumstances require. The Commissioner may declare the schedule erroneous or inadvertent and erase his signature from it without violating any rights of the taxpayer. *Daube* v. *United States*, 289 U. S. 367, 53 S. Ct. 597, 77 L. Ed. 1261. Ordinarily a statute of limitation does not begin to run until a suit could be brought. Certainly it cannot be contended that a suit of this nature may be maintained and judgment secured after the schedule of refunds and credits has been approved, but before the money is paid to the taxpayer.

It is true that in the *Paulson* case the schedules of overassessment were signed before May 28, 1928, and hence were not affected by Section 1104 of the Revenue Act of 1932, *infra*, p. 12. But it is manifest that Section 1104 would not have evoked a different decision. The court did not even comment on the definition of date of "allowance" of a refund contained in Section 1116 (b) (2) of the 1926 Act. Indeed, the court explicitly rejected the contention that the date of allowance is the date on which a refund is made within the meaning of Section 610 of the Revenue Act of 1928 (p. 99):

> * * * the statute does not provide that the suit shall be filed within two years after the refund is allowed. On the contrary, it is provided textually that the period shall run from the time the refund is made. The distinction between the act of allowing a

> refund and that of refunding the money is manifest, * * *. Congress could have provided that suit must be filed within two years after the refund is allowed; but for reasons sufficient unto itself, it provided otherwise.

That the Circuit Court of Appeals for the Tenth Circuit has persisted in this view even as to schedules signed after May 28, 1928, is indicated by *Smyth* v. *United States*, Prentice-Hall, 1937 Federal Tax Service, par. 1491 (July 1, 1937). Although it appears from the record that that suit was filed within two years of the approval of the schedule of refunds, that fact is not disclosed by the opinion, and in the opinion, which treats of the effect of Section 610 of the Revenue Act of 1928, the court states simply that the amount of the overassessment was refunded on January 11, 1932, and that complaint was filed November 9, 1933. It is clearly the date of the actual payment by the Government which the court regards as significant.

3. The question in this case is important for the practical administration of the income tax laws. Though there has been no published administrative ruling, the officials of the Bureau of Internal Revenue and of the Department of Justice have consistently proceeded upon the assumption that the statute of limitations starts running with the delivery of the refund check. An investigation of all suits brought by the United States to recover an erroneous refund and now pending in the dis-

trict courts, discloses that in twenty-two cases,[3] though the taxpayer has not yet raised the point, the facts are that suit was filed more than two years after the Commissioner signed the schedule but within two years of the actual payment of the refund. In three other cases, including one now before the Circuit Court of Appeals for the Ninth Circuit, the taxpayer, after the instant case was decided by the Circuit Court of Appeals for the Third Circuit, raised the issue of the expiration of the limitation period. These cases involve a total amount of several millions of dollars.

CONCLUSION

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

OCTOBER 1937.

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[3] These cases arise in seven circuits, as follows:
First Circuit: (D. Mass.) (2 cases); (D. R. I.).
Second Circuit: (D. Conn.) (3 cases); (E. D. N. Y.); (S. D. N. Y.); (D. Vt.).
Third Circuit: (D. N. J.); (E. D. Pa.) (4 cases).
Fifth Circuit: (S. D. Fla.); (D. Ga.).
Seventh Circuit: (N. D. Ill.) (2 cases); (D. Ind.).
Ninth Circuit: (S. D. Cal.) (2 cases).
Tenth Circuit: (W. D. Okla.).
The same facts characterize another case, now before the Circuit Court of Appeals for the Eighth Circuit on another question.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

* * * * *

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund * * *.

(b) As used in this section—

* * * * *

(2) The term "date of the allowance of the refund means, in the case of any income, war-profits, or excess-profits tax, the first

date on which the Commissioner signs the schedule of overassessments in respect thereof.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 614. INTEREST ON OVERPAYMENTS.

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

* * * * *

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

* * * * *

(U. S. C., Title 26, Sec. 1671.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 1104. DATE OF ALLOWANCE OF REFUND OR CREDIT.

Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax. (U. S. C., Title 26, Sec. 1670.)

Extract from Report of Senate Finance Committee having reference to Section 1116 of the Revenue Act of 1926 (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38):

In the case of refunds, interest is allowed "to the date of the allowance of the refund." In practice the commissioner first signs a

schedule of overassessments, which is sent to the collector, in order to determine whether the overpayment should be credited or refunded. The committee amendment proposes to fix as the date on which a refund is allowed the date on which the commissioner signs the schedule of overassessments.

Extract from Report of Senate Finance Committee having reference to Section 1104 of the Revenue Act of 1932 (S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 57-58):

Under the practice once prevailing in the Bureau of Internal Revenue the commissioner first signed a schedule of overassessments, which fixed the amount of the taxpayer's overassessment, and later, after the collector had made appropriate adjustments to the taxpayer's account in accordance with this schedule, signed a schedule of refunds and credits, which formally approved the action so taken and directed the making of any money payments due the taxpayer. In recent years the schedule of refunds and credits has been abandoned; the commissioner's final action consists in signing the schedule of overassessments, which in itself contains complete directions as to the further steps to be taken toward abating, crediting, or refunding the overassessments entered on the schedule. Some question has arisen as to whether certain court decisions, rendered upon the basis of the previous practice and holding that the allowance of the refund or credit takes place upon the signing of the second schedule, are applicable under the new practice. The provisions of this section, added by your committee, establish a rule which accords with the practice of the Treasury and permits the allow-

ance of refunds and credits with the minimum of difficulty to the Government and the taxpayers as well. It protects the interests of small taxpayers particularly, who may not learn of any refund or credit which may properly be due them in sufficient time to file a claim and may lose the benefit thereof unless the commissioner by signing the schedule of overassessments can make the allowance within the statutory period. In order to settle any question as to the commissioner's allowance of a number of small refunds and credits in cases recently arising, your committee has made the provisions of this section retroactive to the date of the enactment of the 1928 Act.

Extract from Report of House Committee on Conference (H. Rep. No. 1492, 72d Cong., 1st Sess., pp. 28–29):

Amendment No. 259: This amendment makes it clear that credits or refunds are to be considered as allowed on the date on which the commissioner first signed the schedule of overassessments, provided the schedule was signed after May 29, 1928; and the House recedes.